

(1) Its standing with the trade and with the Penn Pocahontas Coal Company will be lost;

(2) Plaintiff's profits under the sale to the Penn Pocahontas Coal Company will be lost and it will be liable in damages to the Penn Pocahontas Coal Company; and

(3) That the amount either of the liability of the plaintiff if it cannot deliver the coal to the Penn Pocahontas Coal Company, of the liability of the Penn Pocahontas to the Portuguese government, or of the profits of the plaintiff in the event of the successful carrying out of its contract and that of the Penn Pocahontas Company with the Portuguese government, whichever of these may result, are impossible of ascertainment. Therefore the plaintiff has no adequate or complete remedy at law.

#### WHEREFORE PLAINTIFF PRAYS:

(1) That this court issue its temporary restraining order against the defendant, his agents, assistants, deputies and employees and all persons acting or assuming to act under their direction, enjoining and restraining them from:

(a) Carrying into effect the purported illegal and unauthorized cancellation of the sale to the plaintiff of this coal.

(b) Reselling or attempting to resell this coal to any other person whatsoever than the plaintiff, the legal owner thereof:

(c) Delivering any or all of this coal to any other person.

(2) That upon hearing of motion for a preliminary injunction that this Court continue the temporary restraining order as a preliminary injunction.

(3) That upon final hearing this Court make permanent the preliminary injunction.

(4) That upon hearing of this cause the Court decrees that:

(a) The sale of this coal to the plaintiff by letter of War Assets Administration, dated March 19, 1947, is still valid and in effect.

(b) That the purported sale to the Midland Coal Company is illegal, because title to this coal is in the plaintiff.

(c) That, in view of the delay and disruption of arrangements caused by the purported cancellation, plaintiff shall have thirty days from the date of this Court's final order in which to give shipping instructions.

(d) That the plaintiff may have such other further and different relief as may to the Court seem proper and just in the premises.

(s) T. PETER ANSBERRY,  
1029 Vermont Avenue, N. W.,  
Washington, D. C.,

*Attorney for Plaintiff.*

Subscribed and sworn to before me this 29th day of April,  
A. D. 1947.

CHARLES E. STEWART, *Clerk.*

By H. B. DERTZBAUGH,

*Deputy Clerk.*

STEPHEN J. McMAHON, Jr.,

*Of Counsel.*

WAR ASSETS ADMINISTRATION  
P.O. Box 6030  
Dallas 2, Texas

In reply refer to:  
RDL/DSS

FILED  
APR 29 1947  
CHARLES E. STEWART, Clerk

AIR AIR

Domestic & Foreign Commerce Corp.  
209 Mills Building  
Washington, D. C.

Gentlemen:

This Agency has for sale on competitive bids,  
10,000 short tons (more or less) of Bituminous Coal, de-  
scribed as follows:

Stove size, mined near Henryetta,  
Oklahoma; mining company, moisture content,  
volatile matter, fixed carbon percent, ash per-  
cent, B.T.U.'s per pound and ash fusion temper-  
ature are unknown. Stored outside on ground in  
three windrows, for approximately three years,  
adjacent to a switch track of Frisco line.

This coal is offered FOB cars, Camp Maxey, north of Paris,  
Texas.

Your early offer on the enclosed blank for all or  
a minimum quantity of 5 cars would be appreciated. Loading  
must be accomplished by March 15. You are urged to inspect  
this coal. Failure to do so will not constitute grounds for  
a claim.

Sincerely yours,

*Frank M. Gray*  
FRANK M. GRAY, Chief  
Materials & Supplies  
Division

Enclosure  
OP blank



GA WUTLONGRAM EL1 DL CHG DOMESTIC AND FOREIGN  
COMMERCE CORPORATION, MARCH 13, 1947 =

PERSONAL,

FILED  
APR 29 1947  
CHARLES E. STEWART, Clerk

MR HARRY L. HOLLIDAY, REGIONAL DIRECTOR,  
REGIONAL OFFICE, WAR ASSETS ADMINISTRATION, DALLAS, TEXAS=

REFER YOUR PROPOSAL RDL/DSS DATED MARCH 11TH FOR 10,000  
TONS PREPARED STOVE COAL NOW LOCATED CAMP MAXEY, TEXAS.

REQUEST THIS TONNAGE BE ALLOCATED TO US ON SAME TERMS AND  
CONDITIONS AND MADE A CONTINUING PART OF OUR RECENT CONTRACT  
AT SAME PRICE. IMPOSSIBLE LOAD TONNAGE ON OR BEFORE MARCH  
FIFTEENTH AS IT IS NECESSARY TO ESTABLISH SPECIAL FREIGHT  
RATE FOR EXPORT OF THIS FUEL. DUE DOMESTIC SHORTAGES OF  
RAILROAD FUEL, WE, BY AGREEMENT WITH SECRETARY KRUG AND  
DEPUTY DIRECTOR, SOLID FUELS ADMINISTRATION, PERMITTED  
PORTION OF OUR LAST COAL TO BE DIVERTED TO RAILROADS AND IT  
WAS AGREED WHEN FIRST SURPLUS COALS WERE AVAILABLE THEY  
WOULD BE ALLOCATED TO US IN ORDER TO REPLENISH AND FULFILL  
OUR FIRM CONTRACTS. IMMEDIATELY UPON RECEIPT OF ALLOCATION  
OF THIS COAL WE WILL PROCEED TO HAVE FREIGHT RATES  
ESTABLISHED. CONTRACT SHALL BE ON CASH BASIS BASED ON  
RAILROAD SCALE WEIGHTS AS HERETOFORE AND PAYMENT MADE UPON  
PRESENTATION OF YOUR INVOICES TO SAME BANK IN DALLAS.  
PLEASE ANSWER IMMEDIATELY=

DOMESTIC AND FOREIGN COMMERCE CORPORATION,  
J.T.KINGSLEY, PRESIDENT.....

..10,000 TONS . MARCH 11TH.....RDL/DSS



**EXHIBIT C**

**WAR ASSETS ADMINISTRATION**  
Grand Prairie Regional Office  
Region 26  
P. O. Box 6030  
Dallas 2, Texas

In reply refer to:  
RDL-DSS

*Mem. fac*  
**FILED**  
**APR 29 1947**  
**CHARLES E. STEWART, Clerk**

*H. J.*  
March 19, 1947

**AIR MAIL**

Domestic and Foreign Commerce Corr.,  
209 Mills Building,  
Washington, D. C.

Attention: J. T. Kingsley, President

Gentlemen:

Your offer of \$1.75 a ton for approximately 10,000 tons of coal is accepted. Also, your terms of placing \$17,500.00 with the First National Bank, Dallas, Texas, for payment upon presentation of our invoices to said bank are accepted. However, it may be to your advantage to deposit the \$17,500.00 with this office for deductions from the amount as shipments are made until this sum is exhausted, or until the coal is completely shipped, whichever occurs first. Any balance of this \$17,500.00 would be immediately refunded upon request.

Please fill in shipping instructions and sign and return the original of the enclosed Sales Memorandum immediately as the camp site is in the process of being cleared.

Your prompt reply to our offering is appreciated.

Sincerely yours,

*for* *W. H. Hawley*  
FRANK M. GRAY, Chief  
Materials & Supplies Division

Enclosure  
Sales Memo (dup)



FILED  
APR 29 1947  
CHARLES E. STEWART, Clerk

WAR ASSETS ADMINISTRATION  
REGIONAL OFFICE

P.O. Box 6030 Dallas 2, Texas  
620 Magoffin Avenue El Paso, Texas

OFFER TO PURCHASE

The Domestic & Foreign Commerce Corporation

(Purchaser)

209 Mills Building

(Street address)

Washington 6, D. C.

(City or town)

(State)

Shipping instructions Will follow under separate cover.

Purchaser's business is Exporter

(Kind)

☐ Individual ☐ Retail ☐ Distributor ☐ Manufacturer

Purchased for ☐ Own use ☒ Resale

ITEM No.	QUANTITY	DESCRIPTION	CONDITION	UNIT PRICE	TOTAL
3081269-1-1 (41-121-SSC- 41-47)	10,000 tons	Coal, Bituminous, stove size, mined near Henryetta, Oklahoma.  <i>Copies of original sent to Dallas</i>	Stored outside on ground in three windrows for app. 3 years.	\$1.75	\$17,500.00

Accepted:

By \_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Title)

Date \_\_\_\_\_

PLEASE DELIVER THE ITEMS STIPULATED ABOVE ACCORDING  
TO THE TERMS AND CONDITIONS ON THE REVERSE SIDE.

PURCHASER The Domestic & Foreign Commerce Corp.

BY Major J. T. Kingsley, President



## EXHIBIT D

### TERMS AND CONDITIONS OF SALE

War Assets Administration reserves the following rights in connection with the sale of surplus property:

- (a) To reject any and all bids and offers;
- (b) To withdraw all or any part of the property included in the sale at any time prior to a Contract of Sale; and
- (c) To reserve the right to require a deposit.

Prospective purchasers are urged to inspect property and arrangements for inspection may be made with the Regional Office of War Assets Administration

### CONDITIONS OF SALE

The term "Sales Memorandum" used herein shall include War Assets Administration's forms of Sales Documents and Sales Orders.

All property will be sold by War Assets Administration subject to the conditions described below.

The Sales Memorandum and these standard conditions of sale constitute the entire agreement between the parties with respect to the sale of the property specified in the Sales Memorandum. No variations from or modifications thereof, and no representations made or warranties given by any representative, agent, or employee of Seller in variance thereof shall be of any effect unless specified in writing and included in the Sales Memorandum. The standard conditions of sale are as follows:

- (a) Unless credit is provided for in the Sales Memorandum, payment must be made in currency, by the Purchaser's check, cashier's check, or money order prior to shipment of the property or its removal by Purchaser.
- (b) Seller makes no warranty, either express or implied, with respect to the property covered by the Sales Memorandum, except (a) Seller warrants it has the right to transfer title to the property; and (b) Seller warrants the accuracy of the description of the property, provided however, that if the property is described as new, Seller warrants only that it has not been used. Seller's liability under this paragraph shall not exceed amount of purchase price.
- (c) Sales are subject to such adjustment upon the request of the Purchaser as the War Assets Administrator, or his authorized representative, in his sole discretion, may determine to be equitable under the circumstances, and any such determination shall be final. Requests for such adjustment will be considered only if filed in writing in the office of War Assets Administration responsible for the sale within fifteen (15) days (or such additional period as may be allowed in writing by the Administrator or such representative) after removal of property by Purchaser or delivery by a common carrier at the original destination.
- (d) In case of error in the extension of prices, the unit price will govern.
- (e) Unless otherwise specifically stated in the Sales Memorandum, all sales are made f. o. b. common carrier (cars or trucks) and shipping expenses will be paid by Purchaser. Specific shipping instructions from Purchaser must be received by the regional office of War Assets Administration responsible for the sale within ten (10) days from the date of the Sales Memorandum; or if prior to the expiration of said 10-day period Purchaser notifies Seller that he will remove the property, such removal must be effected within fifteen (15) days of the Sales Memorandum. Seller will not ship the property to more than one destination except in cases where such separate shipments each constitute a carload, truckload, or a minimum if established by WAA.
- (f) If the property covered by Sales Memorandum is lost, damaged, or destroyed otherwise than by the fault or negligence of Purchaser prior to removal or shipment during the applicable period prescribed in paragraph (e) above for removal or the issuance of shipping instructions, Seller's liability shall, at election of Seller, be limited to the replacement of the property lost, damaged or destroyed or refunding any amount paid by Purchaser therefor.
- (g) If purchaser fails to issue shipping instructions or to remove the property within the applicable period prescribed in paragraph (e) above, the risk of loss, damage, or destruction of the property shall be upon Purchaser. In the event of such failure Purchaser shall, upon demand, pay to Seller reasonable storage charges if the property is stored on premises owned or controlled by the Government, or Seller may store the property elsewhere for the account and at the expense of Purchaser. Seller may also, upon such failure or in the event of default on the part of Purchaser in making payment or otherwise, upon giving ten (10) days written notice to Purchaser, rescind the sale, or resell the property for the account of Purchaser upon such terms and conditions as it deems proper, and Purchaser shall, upon demand, pay to Seller the amount of all losses and expenses incurred by reason of such failure or default. The exercise by Seller of one or more of the rights herein specified will not preclude Seller from exercising any other rights it may have against Purchaser.
- (h) Seller shall not be liable for delay in shipping or loading the property covered by the Sales Memorandum due to causes beyond its control and without its fault or negligence, including without limitation, acts of God or the public enemy, acts or requests of any State or local governmental officer or agent purporting to act under authority, floods, fires, epidemics, quarantine restrictions, riots, sabotage, freight embargoes or failures, strikes, lock-outs, and disputes with workmen.
- (i) Seller reserves the right to cancel the contract of sale without liability in cases where Purchaser is an agent acting for an undisclosed principal if such action is determined by the War Assets Administration in the public interest.
- (j) No Member of, or Delegate to, Congress, or Resident Commissioner of the United States of America shall be admitted to any share or profit in the contract of sale or to any benefit that may arise therefrom unless it be made with a corporation for its general benefit.



Address: P.O. 6030, Dallas 2, Texas

SALES DOCUMENT NO.

SOLD TO Domestic and Foreign Commerce Corp.  
209 Mills Building  
Washington, D. C.

FILED  
APR 29 1947  
CHARLES E. STEWART, Clerk

SHIP TO: SHIPPING INSTRUCTIONS - ROUTING AND DELIVERY

SALE DATE	SALE NO.	TERMS Cash on presentation of wt. tickets as shipped	CONTRACT OR P. O. NO.	TYPE OF BUSINESS Export	PROPOSED USE Resale
REGION 26	SOLD BY DISTRICT	SALESMAN	PROGRAM	DISPOSAL TYPE 03	SALES SECTION 73
PROPERTY LOCATION Camp Maxey, Texas		SEND DELIVERY ORDER TO: Surplus Property Officer Camp Maxey, Texas		DEC. AGENCY - ADDRESS - PLANCOR NO. Camp Maxey, Texas	

ITEM NO.	Cap. No. or Decl. Serial, Page & Line	PROPERTY DESCRIPTION AND CONDITION	UNIT OF MEAS.	UNIT SALES PRICE	NUMBER OF UNITS SOLD	SALES AMOUNT
3081269-1-1 (41-121-830-41-47)	5	Coal, Bituminous, stove size, mined near Henryetta, Oklahoma. Stored outside on ground in three windrows for approximately three years, adjacent to switch track of Frisco line.	ton	1.75	10,000 (approx.)	17,500.00
				SALES TAX		
				TOTAL AMOUNT	17,500.00	

EXHIBIT B

CERTIFICATE OF PURCHASER: THE PURCHASER CERTIFIES THAT IT IS REGULARLY ENGAGED OR IS ABOUT TO ENGAGE IN THE BUSINESS OF HANDLING PROPERTY OF THE TYPE SPECIFIED ABOVE, IN THE CAPACITY INDICATED BELOW, EXCEPT WHERE ITS OPERATIONS ARE OTHERWISE DESCRIBED IN AN ATTACHMENT HERETO.

☐ INDUSTRIAL OR COMMERCIAL USER ☐ WHOLESALE ☐ LARGE RETAILER ☐ SMALL RETAILER ☐ EXPORTER

THE ABOVE PROPERTY IS SOLD SUBJECT TO THE ABOVE TERMS AND TO THE CONDITIONS OF SALE ON REVERSE SIDE OF COPY NO. 2

*Domestic Foreign Commerce Corp.*  
Purchaser  
*Henryetta, Okla.*  
Date *4/28/47*



## EXHIBIT E

### CONDITIONS OF SALE

The Seller's Sales Memorandum and these Conditions of Sale constitute the entire agreement between the parties with respect to the sale of the property specified in the Sales Memorandum. No variations therefrom or modifications thereof, and no representations made or warranties given by any representative, agent or employee of Seller in variance thereof shall be of any effect unless specified in the Sales Memorandum.

- (1) Unless credit is provided for in the Sales Memorandum, payment must be made in currency, by the Purchaser's check, Cashier's check, or money order prior to shipment of the property or its removal by Purchaser.
- (2) Seller makes no warranty, either express or implied, with respect to the property, except (a) Seller warrants it has the right to transfer title to the property; and (b) Seller warrants the accuracy of the description of the property, provided however, that if the property is described as new, Seller warrants only that it has not been used. Seller's liability under this paragraph shall not exceed amount of purchase price.
- (3) Sales are subject to such adjustment upon the request of the Purchaser as the War Assets Administrator, or his authorized representative, in his sole discretion, may determine to be equitable under the circumstances, and any such determination shall be final. Requests for such adjustment will be considered only if filed in writing in the office of Seller responsible for the sale within fifteen (15) days (or such additional period as may be allowed in writing by the Administrator or such representative) after removal of the property by Purchaser or delivery by a common carrier at the original destination.
- (4) In case of error in the extension of prices, the unit price will govern.
- (5) Unless otherwise specifically stated in the Sales Memorandum, all sales are made F.O.B. common carrier (cars or trucks) and shipping expenses will be paid by Purchaser. Specific shipping instructions from Purchaser must be received by the Regional Office of Seller responsible for the sale within ten (10) days from the date of the Sales Memorandum; provided, however, that if prior to the expiration of said ten-day period Purchaser notifies Seller that he will remove the property, such removal must be effected within fifteen (15) days from said date. Seller will not ship the property to more than one destination except in cases where such separate shipments each constitutes a carload or truckload, or minimum lot if established by Seller.
- (6) If the property is lost, damaged, or destroyed otherwise than by the fault or negligence of Purchaser prior to removal or shipment during the applicable period prescribed in paragraph (5) above for removal or the issuance of shipping instructions, Seller's liability shall, at election of Seller, be limited to the replacement of the property lost, damaged or destroyed or refunding any amount paid by Purchaser therefor.
- (7) If Purchaser fails to issue shipping instructions or to remove the property within the applicable period prescribed in paragraph (5) above the risk or loss, damage or destruction of the property shall be upon Purchaser. In the event of such failure Purchaser shall, upon demand, pay to Seller reasonable storage charges if the property is stored on premises owned or controlled by the Government, or Seller may store the property elsewhere for the account and at the expense of Purchaser. Seller may also, upon such failure or in the event of default on the part of Purchaser in making payment or otherwise, upon giving ten (10) days written notice to Purchaser, rescind the sale, or resell the property for the account of Purchaser upon such terms and conditions as it deems proper, and Purchaser shall, upon demand, pay to seller the amount of all losses and expenses incurred by reason of such failure or default. The exercise by Seller of one or more of the rights herein specified will not preclude Seller from exercising any other rights it may have against Purchaser.
- (8) Seller shall not be liable for delay in shipping or loading the property due to causes beyond its control and without its fault or negligence, including without limitation, acts of God or the public enemy, acts or requests of any State or local governmental officer or agent purporting to act under authority, floods, fires, epidemics, quarantine restrictions, riots, sabotage, freight embargoes or failures, strikes, lock-outs and disputes with workmen.
- (9) Seller reserves the right to cancel this contract of sale without liability in cases where Purchaser is an agent acting for an undisclosed principal if such action is determined by the War Assets Administrator to be in the public interest.
- (10) No Member of, or Delegate to, Congress, or Resident Commissioner of the United States of America shall be admitted to any share or profit in this contract of sale or to any benefit that may arise therefrom unless it be made with a corporation for its general benefit.



FILED  
APR 29 1947  
CHARLES E. STEWART, Clerk

Reference:

March 8, 1947

DL-233

War Assets Administration  
Grand Prairie Regional Office  
Region 26  
P.O. Box 6030  
Dallas 2, Texas

Attention: Mr. O. E. Hawley

Gentlemen:

With further reference to my telegram of the 28th relative to an original offer to purchase as indicated in our telegram of March 13th and accepted by you in your letter dated March 19th approximately 10,000 tons of surplus coal now at Camp Maxey, Texas on the basis of \$1.75 per ton, f.o.b. cars. Your letter of the 19th was acknowledged by my office during my illness and the delay in the acknowledgement is regretted.

The purchase of this coal is stipulated as cash on presentation of railroad scale weight tickets showing gross, tare, and net weights attached to the original bills of lading when presented to the First National Bank of Dallas, Dallas, Texas. There has been deposited as of noon today with the First National Bank of Dallas, \$5000.00 to apply against the first shipments of this coal. This deposit was forwarded by the Bank of Manhattan on orders from the Penn-Pocahontas Coal Company, New York City who will act as exporters for this company in the handling of this coal; and immediately this shipment begins to move, the balance of the funds necessary to meet your invoices upon presentation at the bank will be transferred by the New York bank to the First National Bank of Dallas.

It is requested that when shipments are made that the original bills of lading with duplicates thereof be prepared; the originals presented to the bank with the invoices from the War Assets Administration indicating the number of cars and not tons upon which you will draw against the stipulated fund, and the copy of the original bill of lading to be sent to our agent at the Gulf port which will be indicated to you with shipping instructions.

Request has been made to the Southwestern carriers to establish an appropriate freight rate in order that this coal



War Assets Administration

-2-

March 28, 1947

might move to the Gulf port for export. The usual procedure in securing a steamer for this coal has been placed in operation, and we will endeavor to expedite the assignment of this vessel.

We have notified the First National Bank of Dallas, Dallas, Texas that this deposit has been made and the purpose thereof which you can confirm by contacting the officials of that bank. It is specifically stipulated that these funds are for no other purpose except to meet the invoices presented by you in accordance with the terms of this contract.

# There is attached hereto the original Sales Memorandum and the Offer to Purchase for your records. #

# We will advise you shipping instructions immediately upon our notification of the steamer's assignment. #

Very truly yours,

THE DOMESTIC & FOREIGN COMMERCE CORP.

J. T. Kingsley  
President

JTK:hv  
Enc.



CLASS OF SERVICE  
This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

BY DIRECT W1

EXHIBIT G

# WEST UNION

A. N. WILLIAMS  
PRESIDENT

NL - Night Letter

LC - Deferred Cable

NLT - Cable Night Letter

Ship Radiogram

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

LONG WU A86 GOVT PD=WUX DALLAS TEX APR 1 1947 936 A

J T KINGSLEY.

DOMESTIC AND FOREIGN COMMERCE CORP:

FILED

APR 29 1947

CHARLES E. STEWART

Clerk

=REFERENCE YOUR OFFER TO PURCHASE 10,000 TONS COAL AT \$1.75  
TON, FIRST NATIONAL BANK DALLAS REFUSES TO GUARANTEE PAYMENT  
FOR FULL AMOUNT UNLESS \$17,500 IS ON DEPOSIT THEIR BANK FOR  
THIS PURPOSE. UNLESS \$17,500 IS DEPOSITED FIRST NATIONAL BANK  
DALLAS FOR PAYMENT OF TOTAL QUANTITY THIS COAL BY NOON APRIL 4  
SALE WILL BE CANCELLED AND OTHER DISPOSITION MADE. END/RDL-

•DSS/SP-1/LERER•

FRANK M GRAY

CHIEF MATERIALS AND SUPPLIES DIVN WAA DL

.10,000 \$1.75 \$17,500 \$17,500 4 END/RDL-DSS/SP-2-

==SP-1/LERER. 1108A



E.2 DL CHG TO DOML IC AND FOREIGN COMME JE CORP APRIL 4 1947  
2117P

FILED  
APR 29 1947  
CHARLES E. STEWART, Clerk

MR. WILBUR H. ROBERTS  
ASSISTANT CASHIER FIRST NATIONAL BANK OF DALLAS  
DALLAS TEXAS=

THE PENN POCAHONTAS COAL COMPANY NEW YORK HAVE PLACED TO  
OUR CREDIT IRREVOCABLE LETTER OF CREDIT IN THE AMOUNT OF  
\$12,500 IN ADDITION TO THE FIVE THOUSAND DOLLARS CASH DEPOSIT  
FOR THE SPECIFIC PURPOSE OF MEETING INVOICES RENDERED BY WAR  
ASSETS ADMINISTRATION COVERING PURCHASE OF APPROXIMATELY TEN  
THOUSAND TONS OF COAL WHEN SAID INVOICES ARE SUPPORTED BY THE  
ORIGINAL BILLS OF LADING WITH RAILROAD SCALE WEIGHT TICKETS  
ATTACHED THERETO. PENN POCAHONTAS ALSO ADVISED YOU OF THE  
PURPOSE OF THIS TRANSACTION. WE HAVE NOTIFIED WAR ASSETS  
ADMINISTRATION OF THIS MATTER. WILL YOU DO LIKEWISE=

DOMESTIC AND FOREIGN COMMERCE CORP  
J. T KINGSLEY PRES.

.\$12,500 \$5,000

EXHIBIT H



OPR. HOW LONG WILL IT TAKE A DL  
TO DALLAS TEXAS V.M.N PLS SHOULD GET THERE WITHIN ONE OR TWO  
HOURS

EL1 STRT MSG CHG TO DOMESTIC AND FOREIGN COMMERCE APRIL 4  
1947 (1210P)

FILED  
APR 29 1947  
CHARLES E. STEWART, Clerk

MR HARRY HOLLIDAY  
REGIONAL MANAGER WAR ASSETS ADMINISTRATION  
DALLAS TEXAS

YOUR WIRE APRIL FIRST. WE HAVE PLACED WITH THE FIRST NAT  
IONAL BANK OF DALLAS, DALLAS, TEXAS LETTER OF CREDIT COVERING  
THE BALANCE OF \$12,500 FOR THE SPECIFIC PURPOSE OF MEETING  
YOUR INVOICES SUPPORTED BY THE RAILROAD BILLS OF LADING WITH  
SCALE WEIGHT TICKETS ATTACHED THERETO AS INDICATED IN PUR  
CHASE AGREEMENT COVERING APPROXIMATELY 10,000 TONS COAL STORED  
AT CAMP MAXEY TEXAS. THIS PLACES ON HAND IN THE FIRST NATIONAL  
BANK DALLAS THE FULL AMOUNT OF \$17,500 TO MEET THIS PURCHASE.  
PLEASE ACKNOWLEDGE=

DOMESTIC & FOREIGN COMMERCE CORP

J. T. KINGSLEY PRES.

\$12,500 + 10,000 = \$17,500

*Order to Dallas*  
*12/21*

EXHIBIT 1



CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

EXHIBIT J

# V.V. UNION

A. N. WILLIAMS  
PRESIDENT

MBOLS

y Letter

NL = Night Letter

LC = Deferred Cable

NLT = Cable Night Letter

Ship Radiogram

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

DB80

D. B 646 NL GOVT PD=WUX DALLAS TEX 4

1947 APR 4 PM 15

DOMESTIC FOREIGN & COMMERCE CORP. ATTN MR KINGSLEY=

MILLS BLDG WASHDC=

UNLESS \$17500.00 IS DEPOSITED WITH THIS OFFICE OR ON DEPOSIT WITH FIRST NATIONAL BANK OF DALLAS TEXAS THIS WILL SERVE AS FORMAL NOTICE THAT SALE OF 10000 TONS OF COAL AT \$1.75 A TON WILL BE CANCELLED TEN DAYS FROM THIS DATE

END/RDL/DSS/SP-4/LENER=.

FILED

APR 29 1947

CHARLES E. STEWART, Clerk

FRANK M GRAY ACTING CHIEF MATERIALS & SUPPLIES DIV  
WAR ASSETS ADMN.

\$17500.00 10000 \$1.75 END/RDL/DSSGXSPGARXL'ERER..

*Recd 4/11 830 AM*

22

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

EXHIBIT K

CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

# WESTERN UNION

A. N. WILLIAMS  
PRESIDENT

FILED

APR 29 1947

DL - Day Letter
NL - Night Letter
LC - Deferred Cable
NLT - Cable Night Letter
Ship Radiogram

CHARLES E. STEWART, Clerk

GA WUD130 48/47 COLLECT=FL DALLAS TEX APRIL 10 1133A

J T KINGSLEY, PRESIDENT=DOMESTIC & FOREIGN COMMERCE CORP=

RETEL 9TH CORN EXCHANGE WIRE 4TH RECEIVED ADVISING OPENING  
CREDIT 28861 \$17,500.00 BUT ACTUAL CREDIT NOT YET RECEIVED  
AND WAR ASSETS AWAITING ITS ARRIVAL. THEY EXPRESS PREFERENCE  
FOR FUNDS TO BE PLACED HERE FOR PAYMENT INVOICES RATHER THAN  
AVAILABILITY AGAINST SIGHT DRAFTS ON NEW YORK BANK=

FIRST NATIONAL BANK IN DALLAS.

.9 4 28861 1===\$17,500.00, 246 PM.. CLR..

✓A  
4-10-47  
245

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE



# FIRST NATIONAL BANK

IN DALLAS

CAPITAL \$7,500,000.00 SURPLUS \$7,500,000.00

UNDIVIDED PROFITS \$5,000,000.00

DALLAS 1, TEXAS

April 10, 1947

FILED

APR 29 1947

CHARLES E. STEWART, Clerk

WILBUR H. ROBERTS  
ASST. VICE-PRESIDENT

FOREIGN DEPARTMENT  
CABLE ADDRESS: FIRST BANK

Air Mail

Mr. J. T. Kingsley, President  
Domestic and Foreign Commerce Corp.  
Mills Building  
Washington 6, D. C.

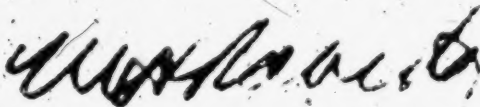
Dear Mr. Kingsley:

In accordance with the request contained in your telegram of the 9th, we have been pleased to wire you today as follows:

^ "RETEL 9TH CORN EXCHANGE WIRE 4TH RECEIVED ADVISING  
OPENING CREDIT 28861 \$17,500.00 BUT ACTUAL CREDIT  
NOT YET RECEIVED AND WAR ASSETS AWAITING ITS ARRIVAL.  
THEY EXPRESS PREFERENCE FOR FUNDS TO BE PLACED HERE  
FOR PAYMENT INVOICES RATHER THAN AVAILABILITY AGAINST  
SIGHT DRAFT ON NEW YORK BANK."

We have discussed this matter with the War Assets Administration and, as stated in our wire, they prefer that the funds should be made available to them here at this bank rather than waiting for a sight draft drawn under a letter of credit to be paid in New York. Of course if it is the desire of the Corn Exchange Bank and Trust Company, New York City, that we pay the drafts here without this bank assuming any responsibility whatsoever, we shall be pleased to render the usual service but we do not care to assume any responsibility for the payment of the drafts in New York City.

Very truly yours,



Asst. Vice President

..HR:mg

cc: War Assets Administration



FILED APR 29 1947

CHARLES E. STEWART, Clerk

**Corn Exchange Bank Trust Company**STRAIGHT IRREVOCABLE LETTER OF CREDIT N<sup>o</sup>. N/Y 28861

\$ 17,500.-

New York, April 4, 1947

Domestic and Foreign Commerce Corporation  
 Mills Building or War Assets Administration  
 Washington 6, D.C.

Gentlemen:

*We hereby authorize you to cash on this company*  
*for account of* Penn Pocahontas Company Inc.  
 New York City

*up to an aggregate amount of* Seventeen thousand five hundred  
*U.S. Dollars*

*available by your drafts at sight for full invoice cost of*  
 10,000 net tons of 2,000 lbs. each, of Oklahoma Stove Size  
 Bituminous Coal from storage at \$1.75 per net ton loaded on  
 Railroad cars at Camp Maxie, Texas. The following documents are to  
 be attached to the drafts: Original Invoice and three copies,  
 Original Railroad Bills of Lading substantiating invoice weights  
 made to the order of Penn Pocahontas Company Inc. dated latest May  
 31st, 1947 evidencing shipment from Camp Maxie, Texas and consigned  
 according to instructions contained in letter to be written and  
 addressed to Domestic and Foreign Commerce Corporation by Penn  
 Pocahontas Company Inc., (original and duplicate copy of letter  
 required) specifying car loading date and tidewater consignment  
 of loaded cars.

Note: This Credit has been advised by wire through the First  
 National Bank of Dallas, Dallas, Texas, with instructions to notify  
 the beneficiary. Bankers should negotiate drafts only against the  
 advice of that bank to beneficiary, this letter being simply a  
 confirmation of draft drawn under this credit which shall state that it is

*drawn under Letter of Credit N<sup>o</sup>. N/Y 28861 dated New York*  
*April 4 1947 and must be advised to this company*

*We hereby agree with the beneficiary that all drafts*  
*issued by virtue of this Credit and in accordance with the*  
*above stipulated terms shall meet with due honor upon*  
*presentation at our office in New York City if drawn and*  
*presented at our office*

June 7, 1947

Yours respectfully,

*Corn Exchange Bank Trust Company*  
*Stewart* *Stewart*  
 AUTHORIZED SIGNATURE VICE-PRESIDENT



EXHIBIT N

LETTER  
OF AMENDMENT

# Corn Exchange Bank Trust Company

13 WILLIAM STREET

FOREIGN DEPARTMENT

CABLE ADDRESS  
CORNEXBANK, NEW YORK

NEW YORK 13, N. Y.

RE: LETTER OF CREDIT NO. 28861

April 14, 1947

ACCOUNT Penn Pocahontas Company Inc.

THE ABOVE LETTER OF CREDIT OPENED IN YOUR FAVOR IS AMENDED IN THAT drafts and documents may be negotiated at the office of the First National Bank of Dallas, Dallas, Texas not later than June 7th, 1947.

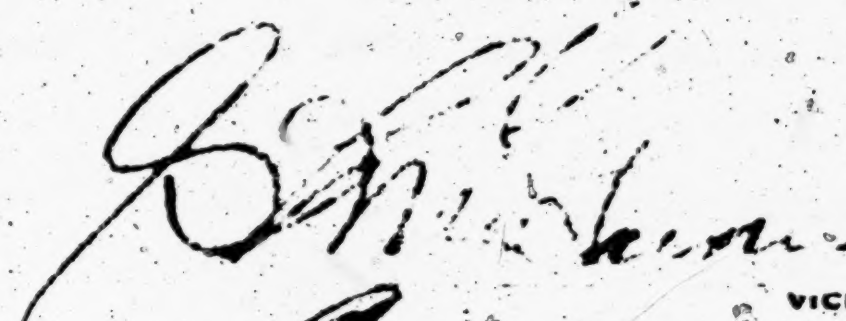
FILED

APR 29 1947

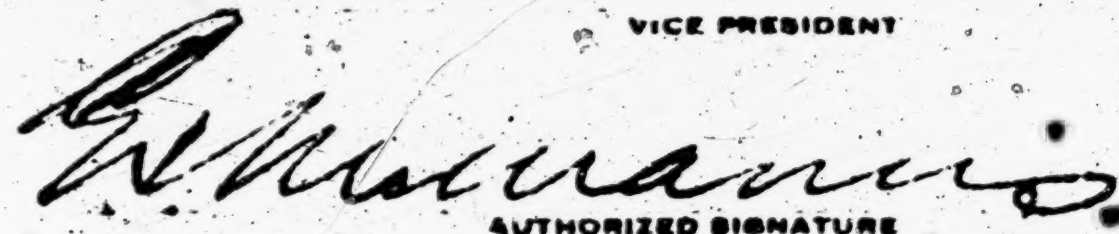
CHARLES E. STEWART, Clerk

ALL OTHER CONDITIONS REMAIN UNCHANGED

To Domestic and Foreign Commerce Corp.  
Mills Building or War Assets  
Administration  
Washington 6, D.D.



VICE PRESIDENT



AUTHORIZED SIGNATURE

26



First National Bank in Dallas  
DALLAS, TEXAS

FILED  
APR 29 1947  
CHARLES E. STEWART, Clerk

April 16, 1947

*Original Ltr  
to it presented  
with documents  
when they must  
begin to move*

War Assets Administration  
P. O. Box 6030  
Dallas, Texas

Re: Corn Exchange Bank Trust Co., New  
York Letter of Credit No. 28861.

Attention: Mr. Hudspeth

Gentlemen:

In accordance with our telephone conversation of this date, we are pleased to quote a telegram received from the Corn Exchange Bank Trust Company, New York, N. Y., which reads as follows:

"NOTIFY DOMESTIC AND FOREIGN COMMERCE CORPORATION MILLS BUILDING WASHINGTON 6 DC OR WAR ASSETS ADMINISTRATION CREDIT 28861 WIRTD APRIL FOURTH AMENDED DRAFTS AND DOCUMENTS MAY BE NEGOTIATED AT YOUR OFFICE NOT LATER THAN JUNE SEVENTH NINETEEN HUNDRED FORTY SEVEN INSTEAD OF PRESENTATION AT OUR OFFICE OTHER CONDITIONS UNCHANGED."

It now appears that we have the necessary authority to pay drawings against the above mentioned letter of credit when presented to our office accompanied by the required documents and the original letter of credit.

Very truly yours,

*J. A. Hobbs*  
Asst. Vice President

HAL:mg



FILED APR 29 1947

CHARLES E. STEWART, Clerk

CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

WEST  
UNION

A. N. WILLIAMS  
PRESIDENT

EXHIBIT P

NL - Night Letter
LC - Deferred Cable
NLT - Cable Night Letter
Ship Radiogram

The filing time shown in the date line of telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

DA 08

D.LC754 GOVT PD=WUX DALLAS TEX 16 653P

DOMESTIC FOREIGN & COMMERCE CORP, ATTN MR KINGSLEY=

209 MILLS BLDG WASHDC=

RE SALE 10,000 TONS COAL AT \$1.75 TON OUR CREDIT DIVISION  
HAS BEEN NOTIFIED BY FIRST NATIONAL BANK, DALLAS, IT DOES  
NOT HAVE SUFFICIENT AUTHORITY TO PAY FOR THIS MATERIAL  
UPON PRESENTATION OF INVOICES. THIS IF FORMAL NOTIFICATION  
SALE IS CANCELLED. END/RDL/DSS-7/LERER=

FRANK M GRAY WAA.

10,000 \$1.75 END/RDL/DSS-7/LERER.

3 PATRONS CONCERNING ITS SERVICE



FILED APR 29 1947 CHARLES E. STEWART, Clerk

BY DIRECT

EXHIBIT Q.

CLASS OF SERVICE

This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

WESTERN  
UNION

A. N. WILLIAMS  
PRESIDENT

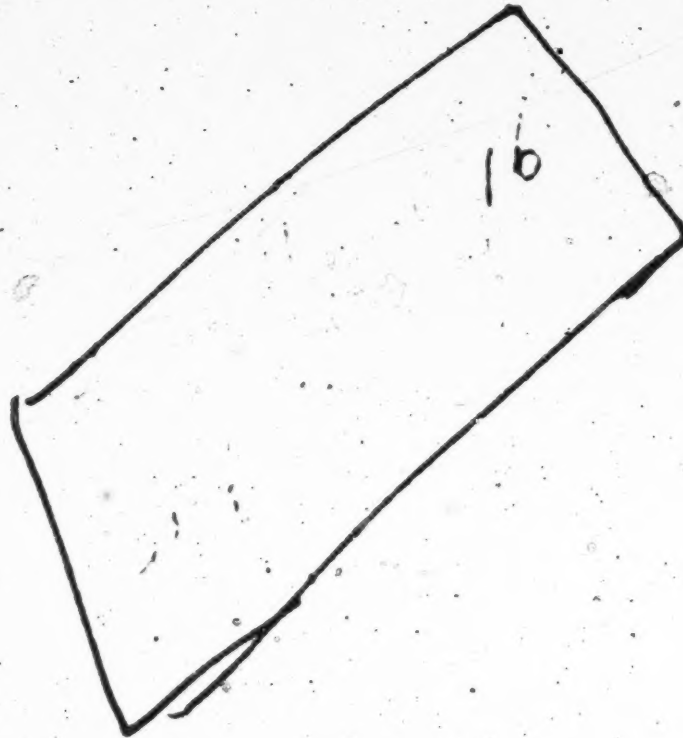
DL = Day Letter
NL = Night Letter
LC = Deferred Cable
NLT = Cable Night Letter
Ship Radiogram

The filing time shown in the date line on telegrams and day letters is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

GA WU T EL1 DL CHG DOMESTIC AND FOREIGN COMMERCE  
CORPORATION, APRIL 17, 1947, =

PERSONAL

MR. HARRY HOLLIDAY,  
REGIONAL DIRECTOR,  
WAR ASSETS ADMINISTRATION,  
DALLAS, TEXAS =



WE HAVE WIRE FROM YOUR MR. GRAY INDICATING THAT FIRST NATIONAL BANK DOES NOT HAVE SUFFICIENT AUTHORITY TO PAY MONIES AGAINST PRESENTATION OF INVOICES SUPPORTED BY RAILROAD BILLS OF LADING COVERING OUR PURCHASE OF COAL NOW AT CAMP MAXEY. THIS COAL HAS BEEN SOLD TO FOREIGN GOVERNMENT AND PORT ARRANGEMENTS HAVE BEEN COMPLETED FOR THE LOADING AND THE FIRST NATIONAL BANK OF DALLAS HAS IRREVOCABLE LETTER OF CREDIT FROM THE CORN EXCHANGE BANK, NEW YORK CITY WITH FULL AUTHORITY TO MEET YOUR INVOICES TOTALING APPROXIMATELY \$17,500.00. WE DO NOT UNDERSTAND THIS ACTION AS BONAFIDE LETTER OF CREDIT IS ESTABLISHED AND IS USUAL COMMERCIAL PROCEDURE. WE WILL APPRECIATE YOUR IMMEDIATE ANSWER AND THIS IS TO FORMALLY PROTEST CANCELLATION AS INDICATED IN YOUR

DOMESTIC AND FOREIGN COMMERCE CORPORATION,  
J.T.KINGSLEY, PRESIDENT

\$17,500.00.....

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE



FILED APR 29 1947 CHARLES E. STEWART, Clerk

EXHIBIT R

GA WUT ELI DL CHG DOMESTIC AND FOREIGN COMMERCE  
CORPORATION, APRIL 18, 1947  
WAR ASSETS ADMINISTRATION,  
WUX, DALLAS, TEXAS

WITH FURTHER REFERENCE OUR PURCHASE OF TEN THOUSAND TONS  
SURPLUS COALS STORED CAMP MAXEY TEXAS AND YOUR ACKNOWLEDGE  
MENT DATED MARCH NINETEENTH. WE HAVE COMPLIED WITH EVERY  
REQUIREMENT UNDER THIS PURCHASE CONTRACT PLUS YOUR DESIRE  
THAT LETTER OF CREDIT BE AMENDED TO PERMIT PAYMENT AT FIRST  
NATIONAL BANK IN DALLAS, DALLAS, TEXAS AND THIS IS FORMAL  
NOTIFICATION WE REGARD CONTRACT STILL IN EFFECT. WE EXPECT  
TO ISSUE SHIPPING INSTRUCTIONS VERY SHORTLY. THIS MATTER HAS  
BEEN TAKEN UP WITH GENERAL MOLLISON REGARDING THIS PURPORTED  
CANCELLATION.

DOMESTIC AND FOREIGN COMMERCE CORPORATION,  
J.T.KINGSLEY, PRESIDENT



Filed Apr 29 1947

**Affidavit of Joseph T. Kingsley**

Joseph T. Kingsley being first duly sworn, deposes and says:

I am president of the Domestic and Foreign Commerce Corporation, plaintiff in the above entitled case, and have personal knowledge of the facts hereinafter stated:

The Domestic and Foreign Commerce Corporation has purchased, by a contract effective March 19, 1947, 10,000 tons of War Assets Administration surplus bituminous coal, located at Camp Maxey, Texas, and described as follows:

"Stove size, mined near Henryetta, Oklahoma; mining company, moisture content, volatile matter, fixed carbon percent, ash percent, B. T. U.'s per pound and ash fusion temperature are unknown. Stored outside on ground in three windrows, for approximately three years, adjacent to a switch track of Frisco line.

"This coal is offered FOB cars, Camp Maxey, north of Paris, Texas."

War Assets Administration Regional Office at Dallas has purported to cancel this contract and to re-sell the coal to another purchaser.

Plaintiff is engaged in the export of War Assets Administration surplus coal. Plaintiff has already purchased, paid for, and exported in excess of 100,000 tons of coal under previous contracts with War Assets Administration, of which this is an extension.

Plaintiff has entered into a contract selling the coal to the Penn Pocahontas Coal Company of New York."

Plaintiff has a guaranteed gross profit of \$1.00 per ton under this contract and a share in any profit over one additional dollar a ton made by the Penn Pocahontas Coal Company.

Plaintiff has fully complied with all of the requirements of its contract with the War Assets Administration and has



had established an irrevocable letter of credit at the First National Bank in Dallas in the amount of \$17,500.00, which will pay the full purchase price of the coal when the defendant presents sight draft, with bills of lading and railroad scale weights attached, to that bank.

Plaintiff is informed by the Penn Pocahontas Coal Company that they have resold the coal involved to the Portuguese government at a price of \$8.50 to \$9.00 per ton FOB Texas ports, the exact price depending upon the port used.

Plaintiff has had special railroad rates established for the movement of this coal at a cost of \$2.06 per ton from Camp Maxey to various Texas ports.

Plaintiff has been informed by the War Assets Administration Regional Office, by telegram dated April 16, 1947, that the sale of the coal to it is cancelled. If

37 this cancellation is allowed to stand, plaintiff will lose a valuable standing it has established in the coal export trade, its business will suffer, and plaintiff may become liable to claims by the Penn Pocahontas Coal Company under its contract, and by the Portuguese government.

Affiant alleges that, as stated in the complaint, the War Assets Administration has purported to cancel the sale and that if this cancellation remains in effect, plaintiff will be immediately and irreparably damaged to the extent of \$3.00 per ton of coal involved in addition to the liability which plaintiff may incur for failure to make delivery to the Penn Pocahontas Coal Company.

1 Joseph T. Kingsley

JOSEPH T. KINGSLEY

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this twenty-ninth day of April, 1947.

2 EVA C. RUFF

Notary Public, D. C.

My Comm. Expires 2-28-'51.



31

Filed Apr 29 1947

**Temporary Restraining Order**

Whereas, in the above entitled cause, it has been made to appear by the verified complaint herein and by the affidavit of Joseph T. Kingsley sworn to April 29, 1947, that there is danger of immediate and irreparable injury, loss or damage of a large but unascertainable measure being caused to the plaintiff before notice can be served for the reason that such injuries are liable to occur before hearing upon notice can be had, because the defendant, War Assets Administration, has entered into a purported contract of sale of plaintiff's coal to the Midland Coal Company, and may at any time begin making delivery of the coal, and if such delivery is made the plaintiff will be illegally deprived of coal owned by it and will be irreparably injured in its business.

Now Therefore, on motion of the plaintiff it is ordered that you, the defendant herein, your agents, deputies and employees, are hereby temporarily restrained and enjoined from:

32 (a) Delivering any of said coal located at Camp Maxey, Texas, to Midland Coal Company or to any other person;

(b) Taking any other action with respect to the use or disposition of this coal except delivering the same to the plaintiff under the terms of its contract.

And you, the defendant, are hereby directed to instruct by telegraph the Regional Office of the War Assets Administration at Dallas, and your employees there, not to make delivery of this coal to anyone or any other disposition thereof, pending further notice from you and the further order of this Court.

This temporary restraint is on condition that a bond be filed by plaintiff herein the sum of \$1,000.00 for the payment of such costs and damages as may be incurred by defendant.



This restraining order will remain in force only until the hearing and determination of the application for a preliminary injunction herein, and shall expire within ten days after entry, unless within said time it is extended for like period with good cause shown, or unless defendant herein consents that it may be extended for a longer period. The matter of the issuance of a preliminary injunction is hereby set down for hearing on the sixth day of May, 1947, at ten o'clock, in the forenoon of said day; or as soon thereafter as counsel can be heard.

This order issued at Washington, D. C., this 29th day of April, 1947, at 3:22 o'clock, P. M.

(Signed) JAMES M. PROCTOR  
*Justice*

40

Filed May 6 1947

### **Motion to Dismiss**

Now comes the defendant, Robert M. Littlejohn, as War Assets Administrator and Surplus Property Administrator, by Peyton Ford, Acting Assistant Attorney General, and George Morris Kay, United States Attorney, and moves the court to dismiss the complaint herein on the grounds that

1. The Court lacks jurisdiction over the subject matter of the suit in that the suit is in reality against the United States for specific performance of a contract to sell coal, and the United States has not consented to be sued.

2. The complaint does not state a claim upon which relief may be granted, because (a) it affirmatively appears from the complaint that plaintiff has not performed all the conditions on its part to be performed, in compliance with the terms of the government's offer to sell; (b) title to the coal in question would not pass until delivery to the carrier, and the complaint does not allege that the coal was ever so delivered; (c) any damages sustained by the plaintiff



resulting from alleged breach of contract would be readily ascertainable in an action at law, and (d) plaintiff has an adequate remedy at law and would not suffer irreparable injury, and hence relief is barred by Section 267 of the Judicial Code, 28 U. S. C. 384.

41. In support of this motion, the Court is respectfully referred to the affidavit of Walter M. Day, verified May 5, 1947, attached hereto.

Peyton Ford

PEYTON FORD

*Acting Assistant Attorney General*

George Morris Fay

GEORGE MORRIS FAY

*United States Attorney*

*Attorneys for defendant*

*Robert M. Littlejohn*

Service is hereby acknowledged May 6, 1947, 9:55 A. M.

STEPHEN J. McMAHON, JR.

42 Filed May 6 1947

**Affidavit**

DISTRICT OF COLUMBIA

*City of Washington, ss.*

Walter M. Day, being duly sworn, deposes and says:

That I reside in the City of Washington, District of Columbia, and am in the employ of War Assets Administration, Washington, D. C., in the capacity of Director, Credit Division, and, as such, have charge of the passing upon and extension of credit on behalf of War Assets Administration in the sale of surplus property.

That, on April 7, 1947, Mr. J. T. Kingsley, President and Treasurer of Domestic and Foreign Commerce Corporation, Washington, D. C. (hereinafter referred to as "Do-



mestic"); accompanied by his attorney, Mr. T. Peter Ansberry, called on me regarding difficulties Domestic was having with respect to an offer to purchase coal from the War Assets Administration Regional Office at Grand Prairie, Texas. Kingsley stated that to pay for the coal, the total cost of which was \$17,500, \$5,000 had been deposited with the First National Bank of Dallas for the sole purpose of making payment. Payment was to be made by the First National Bank of Dallas on presentation of railroad bills of lading, government invoices and weight certificates. He further stated that an additional \$12,500, in the form of a bank letter of credit, was available for the same purpose. Kingsley did not have a copy of the letter of credit with him nor was he able to furnish information regarding its terms. At no time since then has the letter of credit or a copy thereof been presented to War Assets Administration for inspection. Kingsley and Ansberry called on me a number of times after April 7, the last being on April 21, at which time they left a memorandum purporting to be a history of the transaction.

That, pursuant to my request, the War Assets Administration Regional Office at Dallas, Texas, forwarded to me copies of all letters and telegrams in connection with the proposed sale to plaintiff. That the statements made by me in this affidavit in connection with the negotiations at the Dallas Office are upon information and belief; that the sources of information and the grounds for my belief are based upon the file of correspondence received from the Dallas Office.

That War Assets Administration officials are not permitted to extend credit to commercial buyers unless complete information on the financial standing of the prospective debtor is furnished by the prospective debtor.

That it is the policy of War Assets Administration to retain title to property, subject of a contract of sale, until the property has been turned over to a common carrier, at which time invoices are presented to the purchaser for pay-



ment, so that at no time is credit extended unless arrangements therefor have been made in advance.

44. These facts are clearly stated in the Standard Terms and Conditions in the memorandum of sale with the plaintiff, which stated in part as follows:

"Unless credit has been established, payment must be made . . . prior to shipment of the property or its removal by purchaser.

"Specific shipping instructions from the purchaser must be received by the Regional Office of Seller responsible for the sale within ten (10) days from the date of Seller's instructions to Purchaser to make remittance and to furnish shipping instructions.

"If the property is lost, damaged or destroyed otherwise than by the fault or negligence of Purchaser prior to shipment during the applicable period prescribed . . . above for . . . issuance of shipping instructions, Seller's liability shall be limited . . .

"If Purchaser fails to issue shipping instructions within the applicable period . . . , the risk of loss . . . shall be upon the Purchaser."

In this case Domestic has stipulated five methods of payment, only one of which was accepted by War Assets Administration. On March 13, 1947 Domestic requested that 10,000 tons of coal be allotted to it and stated that:

"Contract shall be on cash basis based on railroad scale weights as heretofore and payment made upon presentation of your invoices to same bank in Dallas."

This arrangement for payment was and is interpreted by War Assets Administration as follows: Coal, at an agreed upon price per ton, the weight to be established by the railroad, would be paid for by a Dallas bank on presentation of invoices; that funds to pay had been or would be deposited by Domestic with the Dallas bank or that arrangements for



credit by such bank had been or would be arranged by Domestic.

The manner of payment was sought to be modified and varied by Domestic on March 28, 1947, as follows: Cash payment on presentation of railroad scale weight tickets showing gross, tare, and net weights attached to the original bills of lading when presented to the First National Bank of Dallas. It was requested that the original bills of lading be presented to the bank with invoices and that duplicate bills of lading be sent to Domestic's agent at a Gulf port to be specified.

The letter advising War Assets Administration of the proposed change in the method of payment also stated that on noon that day, March 28, 1947, the Bank of Manhattan had, on orders of Penn-DuPont Coal Company, deposited \$5,000 with the First National Bank of Dallas. In another letter dated the same day Domestic stated that immediately the coal began to move the fund would be supplemented by an additional \$12,500.

This change in the method of payment was not accepted by War Assets Administration and, on April 1, 1947, Domestic was advised that unless "\$17,500 is deposited First National Bank, Dallas, for payment of total quantity this coal by noon 4/4/47 sale will be cancelled and other disposition made". On April 4, 1947 Domestic was advised that unless \$17,500 was deposited with War Assets Administration or the First National Bank of Dallas the sale would be cancelled ten days from that date. Thus the method of payment originally proposed by Domestic on March 13, 1947 and accepted by War Assets Administration and that proposed on March 28, 1947 differ radically. An irrevocable deposit of \$17,500 to be paid to War Assets Administration on presentation of bills of lading, weight certificates and invoices differs materially from a deposit of \$5,000 to be paid to War Assets Administration on presentation of bills of lading, weight certificates and invoices, particularly when the deposit was made by a person other



than Domestic and it can be assumed under definite restrictions to protect the interests of the depositor, Penn-Pocahontas Coal Company. Therefore, War Assets Administration was justified in advising Domestic that failure to deposit by a specified time the full amount, \$17,500, would result in cancellation.

46 In response to War Assets Administration's wire of April 1, Domestic on April 4, 1947 wired that it had placed with the First National Bank of Dallas a letter of credit for the balance of \$12,500. This was never done.

On April 7, 1947 War Assets Administration was advised by the First National Bank of Dallas that it had, on April 4, 1947, received telegraphic advice from the Corn Exchange Bank Trust Company, New York, of the opening of an irrevocable straight letter of credit in favor of Domestic and War Assets Administration in the amount of \$17,500 for the account of Penn-Pocahontas Coal Company. The advice stated that payment would be made by the Corn Exchange Bank Trust Company on receipt of sight drafts on them, accompanied by:

1. Original invoices and three copies covering 10,000 net tons (of 2,000 lbs. each) of Oklahoma stove-size, bituminous coal from storage, at \$1.75 per net ton loaded.

2. Original railroad bills of lading substantiating invoice weights made to order of Penn-Pocahontas Company, Inc. dated latest May 31, 1947, evidencing shipment and consigned according to instructions contained in letter to be written and addressed to Domestic by Penn-Pocahontas.

3. Original and duplicate of letter of Penn-Pocahontas to Domestic specifying car-loading date and tide-water consignment of loaded cars.

The telegraphic advice stated that the drafts must be presented not later than June 7, 1947. The advice of opening was telegraphic and the actual letter of credit was not received by the Dallas bank or War Assets Administration any time prior to cancellation.



The letter of credit referred to in the wire from the Corn Exchange Bank Trust Company to the Dallas Bank as quoted in the letter of the Dallas Bank to War Assets Administration dated April 16, 1947 did not comply with the original proposal of Domestic, or the April 1st or April 4th, 1947 demand of War Assets Administration. Had the War Assets Administration been willing to accept a letter of credit, the one referred to in the aforesaid letter would not have been satisfactory for the following reasons:

1. Shipment in full was required by not later than May 31, 1947 and no shipping instructions had been received. Thus, there could be no assurance of shipment in full by May 31, 1947.

2. The letter, or letters, of Penn-Pocahontas to Domestic had not been received by War Assets Administration—in fact, had never been heard of before. Payment was dependent upon possession of the letter, or letters, in duplicate.

3. The time for presentation, June 7, 1947, did not allow sufficient time for receipt of all bills of lading and weight certificates, preparation of all invoices and sight drafts.

The last objection was sought to be met by Domestic by a further change, in that payment was to be made by the First National Bank, but with the other conditions unchanged. However, a new condition, that the original letter of credit must be presented with the drafts and the original letter or letters from Penn-Pocahontas to Domestic, was imposed. The letter of credit was never presented to War Assets Administration. Therefore, War Assets Administration was not in a position to secure payment and, consequently, the sale was cancelled on April 16, 1947.

To summarize, the proposed sale to Domestic was cancelled by War Assets Administration for the following reasons:

1. Arrangements for payment satisfactory to War Assets Administration were never made. Alternative methods ar-

ranged by Domestic without the prior knowledge of consent of War Assets Administration were unacceptable as there was no assurance of payment except under conditions War Assets Administration was never in a position to fulfill due to the remissness on the part of Domestic in its failure to give shipping instructions.

2. Shipping instructions were never received.

WALTER M. DAY

Subscribed and sworn to before me this 5th day of May, 1947.

JUANITA M. VIDI

*Notary Public, District of Columbia*

My Commission Expires: March 1, 1952.

49

Filed May 6 1947

### **Affidavit**

W. T. Lennon, being duly sworn, deposes and says:

That he resides in the City of Washington, District of Columbia, and is in the employ of the War Assets Administration, as Chief Counsel in charge of Special Projects.

That, pursuant to the temporary restraining order granted by this Court, on the 29th day of April, 1947, deponent caused to be transmitted to the Regional Office of War Assets Administration at Grand Prairie, Texas, a telegram, copy of which is hereto attached and made a part of this affidavit. That the telegram was directed to Grand Prairie, Texas, for the reason that the Office of the Regional Director of that Region had been moved to Grand Prairie from Dallas, Texas, prior to the filing of this action.

That, upon information and belief, no deliveries of the coal involved in the above entitled law suit have been made. That, prior to the service of the summons and complaint and restraining order in the above entitled action upon the defendant herein, and prior to any knowledge that the ac-



tion and restraining order were filed, the War Assets Administration engaged personnel and procured, 50 equipment for the purpose of loading the coal involved in this law suit. That said equipment and personnel were transported to Camp Maxey for the purpose of loading the coal on railroad cars for delivery to Midland Coal Company. That said equipment and personnel, at the present time, are being held at Camp Maxey pending the disposition of the restraining order. That War Assets Administration has been damaged by virtue of the service of the restraining order in that it has been put to considerable expense for transporting equipment and personnel, as aforesaid. The exact amount of the expense is being ascertained by deponent from the Grand Prairie Regional Office.

W. T. LENNON

Subscribed and sworn to before me this 6th day of May, 1947.

MARY M. REPETTI

*Notary Public, District of Columbia*

My Commission expires 12-1-49.

Service is acknowledge subject to objection and objected to May 6, 1947 10:20 A. M.

STEPHEN J. McMAHON, JR.

69 **Hearing Before Honorable Jennings Bailey**  
**Tuesday, May 6, 1947**

Mr. Margoliis: I represent the defendant. We have a motion to dismiss that we served on plaintiff this morning that I would like to file with the Clerk, if I may; and, since there is a motion to dismiss, if the plaintiff has no objection, we think that might very well take priority.

The motion to dismiss goes into the merits—

Mr. Ansberry: If Your Honor please; I do have objection because this was not served on us until court time this morning, at 10 a.m.

The Court: Of course if I find out the complaint does not state a cause of action—

Mr. Ansberry: I agree, but I think that—

The Court: I will hear the motion, but it necessarily involves a question of law, to it.

Mr. Margoliis: May I file these with the Clerk?

Mr. Ansberry: I object to the filing at this time under Rule 7. I will object to the filing of the motion to dismiss at this time in view of Rule 7 of the Rules of the Court.

The Court: What rule?

Mr. Ansberry: Rule 7, if Your Honor please,  
70 which reads that:

“With each motion there shall be filed and served a separate paper stating the specific points of law and authorities to support the motion. Such statement shall be additional to a statement of grounds in the motion itself, and shall be entered on the docket but not be a part of the record. The moving party shall enter the motion and the fact of the filing on a card provided by the clerk. A Statement of opposing points and authorities shall be similarly filed, noted and served within five days or such further time as the court may grant or the parties agree upon. If not filed within the time prescribed the court may treat the motion as conceded.”

We feel, although we don't insist on the point, we feel that the motion has been conceded by a failure to file an opposition within the proper time.

The Court: I will allow the motion to be filed, but not hear it this morning.

Mr. Margoliis: May I point out one thing?

We filed a motion to dismiss. We also filed points and authorities in support of a motion to dismiss, as well as in opposition to the application for a preliminary injunction.

Certainly our points and authorities are specific in their opposition.



The Court: I will be glad to consider your points and authorities, because they really go to the effect of this motion.

Mr. Margolius: Thank you.

The Court: Very well.

Mr. Ansberry: If Your Honor please, we have had no opportunity to examine them.

The Court: That may be, but I am here to pass on your motion, and if they can convince me in any way that the motion should be allowed,—I will hear it, unless you want to postpone the hearing for this injunction until you have had an opportunity to examine it.

Mr. Ansberry: If Your Honor would.

Mr. Margolius: There is a bond of \$10,000 and the government has 10,000 tons of coal which would be tied up, it is highly inflammable, and the equipment.

The Court: You have a right to file points and authorities in opposition to this motion. You have not done so.

Mr. Margolius: There was no motion in this Court.

The Court: It may go over until Friday.

Mr. Margolius: Will the motion to dismiss be heard on Friday?

The Court: I think they should both be heard on Friday, yes.

That is, if the Court has an opportunity to hear it on Friday. Friday is a very busy day in Motions Court.

Mr. Margolius: Will it be heard by Your Honor on Friday?

The Court: I don't know. I am going into Motions Court for the next two days because Judge Proctor, I forget what he said it was about,—he said he might be back on Friday, I don't know. If he is not back Friday, I will be in Motions Court on Friday.

Mr. Ansberry: Thank you, Your Honor.

The Court: If you gentlemen would care to argue this this morning,—I have the rest of the day free—

Mr. Margolius: The government is ready.

Mr. Ansberry: We have had no time to examine—

The Court: I am willing to hear the motion for injunction, but I will consider any authorities—

Mr. Margolius: We received five days,—but nevertheless we were able to be ready this morning, and since the case is really made out by the complaint, we are somewhat surprised that the plaintiff feels itself unable to proceed.

The Court: I am perfectly willing to hear a motion for injunction.

Mr. Ansberry: We are—

Mr. McMahon:—for the—

The Court: I can't hear you both at once.

Mr. Ansberry: Pardon. I was saying, If Your Honor please, that we are prepared on the points raised in our motion for preliminary injunction. We are not prepared on the points and authorities, nor on the affidavit of the government, which raises new matters,—of fact.

Mr. Margolius: We would be prepared—

The Court: The affidavit will be considered on a motion—

Mr. Ansberry: Pardon?

The Court: The affidavit would be considered on a motion for injunction.

Mr. Ansberry: But we would have had sometime, normally, to examine it, prior to coming into court.

I would like to have an opportunity to at least read the government's papers, which comprise 30-odd pages in all.

The Court: Have you filed points and authorities in support of your motion?

Mr. Ansberry: Yes, Your Honor.

Mr. Margolius: We might very well argue whether an injunction should continue from now until Friday.

The Court: Very well. I will hear the application for injunction, now.

Mr. McMahon: This hearing is an application for an injunction on the cross pleadings of the plaintiff, as of this morning,—is that correct?



The Court: I am hearing the motion which has been filed.

Do you have that card, Mr. Belew?

(The Clerk passed a paperwriting to the Court.)

The Court: A motion for a preliminary injunction is what I am going to hear.

There had been a temporary restraining order granted?

Mr. McMahon: Yes, Your Honor.

Mr. Margolius: I resent—I beg your pardon.

The Court: On April 29th, there was a motion for a preliminary injunction filed, and that is the one I will hear now.

Mr. Ansberry: Thank you, Your Honor.

Mr. McMahon: That answers my question.

102 **Hearing Before Honorable Jennings Bailey**  
**May 7, 1947**

The Court: I am satisfied that this suit is in effect a suit for specific performance and the United States is a necessary party, and this Court is without jurisdiction.

The temporary restraining order will be dissolved and the application for a preliminary injunction denied.

Mr. Ansberry: If Your Honor please, the plaintiff will seek to appeal and I will ask Your Honor to indicate the amount of the bond.

The Court: The usual bond is \$250.00, but if you want to get a stay order from the Court of Appeals, I think you had better let me pass on the motion to dismiss, because I think this opinion so far decides that question.

So the motion to dismiss will be sustained, and if you want to apply immediately to the Court of Appeals for a stay order, I will not sign the order—I don't think you can appeal until I have signed the order.

Mr. Ansberry: Does Your Honor wish to make conclusions of law on the point?

The Court: I have already stated what my conclusions of law are:

Mr. Ansherry: Does Your Honor find that title was not in the Domestic and Foreign Commerce Corporation?

The Court: That is my view, that the title is not in the plaintiffs. I think it is simply a suit for specific performance.

Mr. McMahon: Your Honor finds it was a suit for specific performance?

The Court: What is that?

Mr. McMahon: Your Honor finds it was a suit for specific performance, complainant's petition, complaint, rather, was a complaint for specific performance?

The Court: That is my view of it, what it amounts to, yes.

Mrs. Ansherry: Does your Honor find the contract sale, or contract to—

The Court: I am not passing on that. I now sustain the motion to dismiss. I suggest that the matter remain in status quo, this is Wednesday, until Friday. You can apply to the Court of Appeals here for a stay order.

My view is the suit is to be dismissed.

### CERTIFICATE

I, Luceda H. Powell, an official reporter for the District Court of the United States for the District of Columbia, certify that the foregoing is the official transcript of the proceeding had in this case.

LUCEDA H. POWELL

Filed May 9 1947

### Order, Judgment, and Decree

This cause having come on for hearing May 6, 1947, pursuant to an order contained in temporary restraining order issued April 29, 1947, on plaintiff's complaint and motion



for preliminary injunction, together with affidavit and memorandum of points and authorities in support thereof; and plaintiff's counsel having been heard thereon at said hearing May 6, 1947; and defendant having filed a motion to dismiss plaintiff's complaint immediately prior to the hearing on May 6, 1947, supported by affidavits and points and authorities filed concurrently therewith, which were both in support of the motion to dismiss and in opposition to the motion for preliminary injunction; and the court thereupon being of the opinion that the complaint did not state a cause of action; it is hereby

Ordered, Adjudged, and Decreed That:

1. Plaintiff's motion for preliminary injunction be, and it is hereby, denied.
2. Defendant's motion to dismiss the complaint be, and it is hereby, granted.
3. The complaint be, and it is hereby, dismissed with prejudice.

Plaintiff having prayed an appeal in open court, it is ordered that upon plaintiff's giving a cost bond for Two Hundred Fifty (\$250.00) Dollars and One Thousand (\$1,000.00) Dollars injunction bond which may be continued on the consent of the surety in the original injunction bond, a temporary restraining order issue upon the same terms as that heretofore issued in this cause, which shall expire in ten (10) days from the issuance of this order.

(s) JENNINGS BAILEY

*Justice*

May 9, 1947

Approved as to form

(s) PETER ANSBERRY

*Attorney for plaintiff*

(s) PEYTON FORD,

*Assistant Attorney General*

By HUBERT H. MARGOLIES

*Attorney for Defendant*

IN THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA

Docket No. 9553

DOMESTIC AND FOREIGN COMMERCE CORPORATION, MILLS BUILD-  
ING, WASHINGTON, D. C., APPELLANT

v.

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR AND SUR-  
PLUS PROPERTY ADMINISTRATOR, RAILROAD RETIREMENT BUILD-  
ING, WASHINGTON, D. C., APPELLEE

United States Court of Appeals for the District of Columbia.  
Filed May 16, 1947. Joseph W. Stewart, Clerk.

*Motion to advance hearing and to grant leave for mimeographed  
briefs*

Whereas, this is an emergent matter requiring the preserva-  
tion of status quo by injunction pending appeal, and for other  
reasons more fully referred to in the accompanying motions and  
memorandum.

Now, therefore, comes appellant and respectfully petitions and  
moves the court as follows:

1. To advance this cause for hearing on its calendar to Mon-  
day, May 26, 1947, at 11 o'clock in the morning as soon there-  
after as counsel can be heard.

2. To grant leave for counsel to file mimeographed briefs.

Dated May 16, 1947.

(S) T. Peter Ansberry,

T. PETER ANSBERRY,

*Attorney for Appellant.*

(S) STEPHEN J. McMAHON, Jr.,

*Of Counsel.*

Service of motion acknowledged 16 May 1947.

(S) PEYTON FORD,

*Acting Asst. Atty. General.*

(S) GEORGE MORRIS FAY,

*U. S. Attorney.*

(S) EDWARD H. HICKEY,

*Atty. for Def.*



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In the United States Court of Appeals for the District of  
Columbia

Docket No. 9553

DOMESTIC AND FOREIGN COMMERCE CORPORATION, MILLS BUILD-  
ING, WASHINGTON, D. C., APPELLANT

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ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR AND SUR-  
PLUS PROPERTY ADMINISTRATOR, RAILROAD RETIREMENT BUILD-  
ING, WASHINGTON, D. C. APPELLEE

*Motion for leave to file counter affidavit*

Whereas, it appears in the record that an affidavit was filed  
by appellee immediately before the hearing in the court below on  
this cause and appellant had no opportunity to file a counter  
affidavit showing that said affidavit tended to mislead, as it only  
partially stated the facts which it purported to cover.

Now, therefore, comes the appellant and respectfully petitions  
and moves the court for leave to file the attached counter  
affidavit.

(S) T. Peter Ansberry,  
T. PETER ANSBERRY,

*Attorney for Appellant.*

(S) STEPHEN J. McMAHON, Jr.,  
*Of Counsel.*

Service of motion acknowledged 16 May 1947.

(S) PEYTON FORD,  
*Acting Asst. Atty. General.*

(S) GEORGE MORRIS FAY,  
*U. S. Attorney.*

(S) EDWARD H. HICKEY,  
*Atty. for Def.*

In the District Court of the United States for the District of  
Columbia

Civil Action No. 1803-47

DOMESTIC AND FOREIGN COMMERCE CORPORATION, MILLS BUILDING,  
WASHINGTON, D. C., PLAINTIFF

v.

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR AND SUR-  
PLUS PROPERTY ADMINISTRATOR, RAILROAD RETIREMENT BUILDING,  
WASHINGTON, D. C., DEFENDANT

*Counter affidavit*

Joseph T. Kingsley, being duly sworn, deposes and says that the statements of Mr. W. T. Lennon in his affidavit:

"That, prior to the service of the summons and complaint and restraining order in the above entitled action upon the defendant herein, and prior to any knowledge that the action and restraining order were filed, the War Assets Administration engaged personnel and procured equipment for the purpose of loading the coal involved in this law suit. That said equipment and personnel were transported to Camp Maxey for the purpose of loading the coal on railroad cars for delivery to Midland Coal Company,"

are incomplete and tend to mislead the Court, in that they do not fairly cover the subject purported to be covered.

That he has communicated with Mr. C. R. Malone at the Headquarters at Camp Maxey, Texas, by telephone on May 6, 1947. Mr. Malone informed him that two drag lines have been sent to Camp Maxey to handle the loading of this coal, one arriving on April 29th and the other arriving on May 1st, and that no railroad cars have arrived at Camp Maxey for the loading of this coal. That an operator for each dragline are the only personnel which have arrived for the loading.

Deponent says further that on April 18, 1947, he, in company with Mr. Ansberry, conferred with Mr. Larson, Chief Counsel, War Assets Administration, at Mr. Larson's office in the late afternoon, and that he and Mr. Ansberry at that time informed Mr. Larson that if efforts were made to deliver the coal to the Midland Coal Company an injunction proceeding would be filed.

That he and Mr. Ansberry discussed fully with Mr. Larson the documents comprising the contract and the arrangements for payment and the later communications with the Dallas office of the War Assets Administration up to that date. That Mr. Larson then dictated a teletype to the Dallas Regional Office, in the presence of the deponent and Mr. Ansberry which stated, among other things, that Mr. Larson felt that the Domestic and Foreign Commerce Corporation appeared to be acting in good faith and was endeavoring to carry out the contract, and that he, Mr. Larson, wished the file of the Dallas Regional Office to be sent to him for review. On information and belief, that this teletype was duly and promptly forwarded.

That on the same afternoon the deponent and Mr. Ansberry conferred with General Mollison, deputy administrator of War Assets Administration, and that General Mollison also assured them that no action would be taken until the file had been reviewed by the Washington office.

That nothing was heard from Mr. Larson, nor from General Mollison by either the deponent or by Mr. Ansberry on either the 21st, the 22nd, or the 23rd of April, and that although both the



deponent and Mr. Ansberry made repeated efforts to reach both Mr. Larson and General Mollison on the telephone, that they were unsuccessful in so doing. That nothing was heard from the two telegrams to the Dallas office insisting that the contract was in effect and requesting the reason for the attempted cancellation.

That on the morning of April 24th, nothing having been heard from anyone, Mr. Ansberry placed a telephone call to the War Assets Administration at Dallas from the deponent's office. That the deponent listened to the conversation and also recorded the same, and that in the course of the conversation, Mr. Frank M. Gray, Chief of the Materials and Supplies Division of the Dallas Office, informed Mr. Ansberry the coal had been sold to the Midland Coal Company on April 21st and when the matter of Mr. Larson's teletype was brought up, Mr. Gray said of Mr. Larson: "Well, he don't happen to be running our office down here." That Mr. Ansberry in the course of this conversation repeatedly warned Mr. Gray to take no action with respect to loading the coal or delivering the same, because suit would be filed in District Court for the District of Columbia.

That on information and belief, on April 25, 1947, Mr. McDavitt, Chief Investigator for the House of Representatives Sub Committee on Surplus Property, informed Mr. Larson that suit was being prepared and that Mr. Larson informed Mr. McDavitt that efforts were being made to secure other coal with which to settle.

That therefore, in contra-distinction to the surprise implied by Mr. Lennon's affidavit, the War Assets Administration was at all times aware, from April 18th, and of course from April 21st, when they first purported to sell the coal to the Midland Coal Company, until the present time, that they faced litigation before they could deliver the coal to the Midland Coal Company.

(S.) Joseph T. Kingsley,  
JOSEPH T. KINGSLEY.

Sworn to and subscribed before me this seventh day of May, 1947.

[SEAL]

ROBERT FRIBUSH,  
Notary Public.

My Commission Expires: August 1, 1950.

Tuesday, September 30, 1947

The Court met pursuant to adjournment. Present: Honorable D. Lawrence Groner, Chief Justice, Harold M. Stephens, Henry W. Edgerton, Bennett Champ Clark, Wilbur K. Miller and E. Barrett Prettyman, Associate Justices.

Before Honorable Bennett Champ Clark, Wilbur K. Miller and  
E. Barrett Prettyman, Associate Justices:

No. 9553, April term, 1947

DOMESTIC AND FOREIGN COMMERCE CORPORATION, APPELLANT,

v.:

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR &C.,  
APPELLEE

Argument commenced by Mr. T. Peter Ansberry, attorney for  
appellant, continued by Mr. Hubert Margolies, attorney for ap-  
pellee, continued by Mr. T. Peter Ansberry for appellant and  
concluded by Mr. Stephen J. McMahon, Jr., Attorney for appellee.

United States Court of Appeals, District of Columbia

No. 9553

DOMESTIC AND FOREIGN COMMERCE CORPORATION, APPELLANT

v.

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR AND  
SURPLUS PROPERTY ADMINISTRATOR, APPELLEE

Appeal from the District Court of the United States for the  
District of Columbia

Argued September 30, 1947. Decided December 8, 1947

United States Court of Appeals for the District of Columbia.  
Filed Dec. 8, 1947. Joseph W. Stewart, Clerk.

*Messrs. T. Peter Ansberry and Stephen J. McMahon, Jr., for  
appellant.*

*Mr. Hubert H. Margolies, Attorney, Department of Justice,  
with whom Messrs. Edward H. Hickey, Special Assistant to the  
Attorney General, and George Morris Fay, United States Attor-  
ney, were on the brief, for appellee. Messrs. J. Francis Hayden,  
Special Assistant to the Attorney General, and Sidney S. Sachs,  
Assistant United States Attorney entered appearances for  
appellee.*

Before CLARK, WILBUR K. MILLER, and PRETTYMAN, JJ

CLARK, J.: This action originated with a complaint for an in-  
junction filed by the appellant in the District Court of the United  
States for the District of Columbia on April 29, 1947. Appellee



here was named defendant in the complaint in his capacity as War Assets Administrator and Surplus Property Administrator. A temporary restraining order was issued on that date and the cause came on for hearing May 6, 1947; defendant (appellee here) having filed a motion to dismiss. On May 9, 1947, the lower court decreed that the motion for preliminary injunction be denied and granted the motion to dismiss the complaint. This appeal followed.

The facts giving rise to the complaint, briefly stated, are as follows: Appellant had purchased surplus coal from the War Assets Administration during 1946, and early in March 1947 received from the War Assets Administration an invitation to bid on 10,000 tons of coal which stated, "This coal is offered F. O. B. cars, Camp Maxey, north of Paris, Texas." On March 13 appellant answered by telegram, offering to buy the coal as offered and requesting that "this tonnage be allocated to us on same terms and conditions and made a continuing part of our recent contract at same price." A letter from the War Assets Administration to appellant under date of March 19 expressed acceptance of the offer, stating in part, "Also, your terms of placing \$17,500 with the First National Bank, Dallas, Texas, *for payment upon presentation of our invoices to said bank are accepted.*" (Italics supplied.) This letter requested that enclosed standard War Assets Administration forms, one being an offer to purchase and the other being a sales memorandum, be executed and returned, which request was complied with by appellant on March 28. Appellant's letter of transmittal accompanying the forms stated that \$5,000 was being deposited at the Dallas bank that day and that the balance of the funds necessary to meet the invoices would be transferred to the Dallas bank when the shipment began.

War Assets Administration replied by telegram on April 1 informing appellant that the entire amount of \$17,500 should be deposited in the Dallas bank prior to noon on April 4 or the sale would be cancelled. Although appellant arranged for an irrevocable letter of credit payable to War Assets Administration through the Dallas bank within the time specified, and so notified War Assets Administration, there was a further interchange of correspondence and on April 16 War Assets Administration informed appellant by telegram that the sale had been cancelled, holding appellant in default for failing to deposit immediately the full amount of \$17,500 in the Dallas Bank.

Subsequently appellant learned that War Assets Administration had entered negotiations with another party for the sale of the coal involved here and filed the complaint, praying for an injunction against the sale of this coal to any person other than

the plaintiff (appellant) and seeking a decree upon hearing of the cause that the sale to plaintiff is valid and in effect.

The court below, was of the opinion that the complaint did not state a cause of action, after expressing openly the view that the suit was, in effect, one for specific performance involving the United States as an indispensable party, and, therefore, that the court lacked jurisdiction.

We have recently had occasion to scrutinize the doctrine of sovereign immunity as a "jurisdictional" problem,<sup>1</sup> and in doing so we deemed it expedient to adopt the careful analysis which had been made previously by Justice Stephens of this Court in his opinion (dissenting in part, concurring in part) in *Franklin Tp. in Somerset County, N. J. v. Tugwell*, 66 App. D. C. 42, 85 F. 2d 208. For its obvious value in this case we repeat his finding, stated (66 App. D. C. 63; 85 F. 2d 229) that:

"Where a plaintiff asserts that an officer of the Government is acting without power and that therefore his acts are invalid, the court in determining the preliminary jurisdictional question whether the United States is a necessary party (whether necessary parties are before a court is, of course, jurisdictional), is confronted with a peculiar procedural problem, or impasse, arising out of the fact that the determination of this question involves passing upon the very question involved in the merits. \* \* \* Since a court must determine at the outset its jurisdiction to proceed, it is compelled to make a preliminary decision for jurisdictional purposes on the ultimate question in the suit, and this notwithstanding the fact that when the merits are heard, it may be compelled to reach an opposite conclusion. The courts solve this problem by accepting at their face value, for jurisdictional purposes, the assertions of the complainant of want of power in the officers—unless such assertions are 'so unsubstantial and frivolous as to afford no basis for jurisdictional \* \* \*' (citing *Northern Pac. Ry. Co. v. North Dakota*, 250 U. S. 135, 39 S. Ct. 502, 63 L. Ed. 897) and by giving the assertions thus accepted their natural jurisdictional consequences in respect of who are necessary parties."

The words just quoted have real application here. In the complaint appellant asserted that the title to the coal had passed to it (appellant) and appellee, through his agents, was presently engaged in negotiations for disposition of the coal to a party other than the appellant. The complaint was met only by a motion to dismiss supported by affidavits. It was at this stage of the contest that the lower court dismissed the complaint on the ground of lack of jurisdiction. The allegation should have been treated as admitted and therefore the motion to dismiss could be properly granted only if it were clearly apparent to the court that the plaintiff (appellant here) would not be entitled to the relief sought under any state of facts which could be proved in support of the specific claim. *Tahir Erk v. Glenn L. Martin Co.*, 116 F. (2d) 865. The summary nature of the hearing preceding dismissal precluded the careful consideration to which appellant was entitled.

<sup>1</sup>*Dollar v. Land*, 81 U. S. App. D. C. 28, 154 F. (2d) 307 *aff'd*, 330 U. S. 731.



All will concede at the outset that a court has no jurisdiction of a suit against the United States to which the United States has not consented. *United States v. Sherwood*, 312 U. S. 584, 587, 61 Sup. Ct. 767, 85 L. Ed. 1058. That is a ruling doctrine which has long been accepted, as the case cited demonstrates. However, since legal irresponsibility of the Federal Government is derived only by implication from the Constitution, the doctrine has received judicial delimitation which is well established. *United States v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171. Therefore, although we may observe that the War Assets Administration functions only as an agency of the United States, it must also be noted that “\* \* \* the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.” *Keifer and Keifer v. R. F. C.*, 306 U. S. 381, 388, 59 Sup. Ct. 516, 83 L. Ed. 784.

Appellant, as complainant below in the suit for injunction, did not seek the court's aid to interfere in the use of official discretion by the appellee. Such discretion was exercised at the time the contract with appellant was entered into. If that contract served to vest title immediately in appellant then it follows that the ruling in *Philadelphia Company v. Stimson*, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570, is controlling here. That ruling was based on a comprehensive review of the authorities, and we quote the language of Mr. Justice Hughes at pages 619 and 620 (omitting citations):

“If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded \* \* \*. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has been frequently applied with respect to state officers seeking to enforce unconstitutional enactments \* \* \*. And it is equally applicable to a federal officer acting in excess of his authority or under an authority not validly conferred.”

Clearly, then, it was incumbent upon the lower court in determining its jurisdictional capacity to decide the ultimate question of whether or not a contract of sale had been consummated between appellant and appellee. If so, the peculiar nature of the coal involved soundly bases appellant's resort to equity for relief. The use of the word “surplus” in the description of this coal is a word of art which has an important business connotation. Such coal is obtainable only from appellee and has unique value in that it may be exported under special license outside the limitations imposed by the Government under the export allocation system. Appellant had resold this coal, and the re-purchaser had contracted to export the coal to a foreign government. Newly mined

coal obtainable in the open market would not suffice the purpose of the several contracts involving this surplus coal, since it could be exported only in accordance with the export allocation system.

It is our conclusion that the District Court erred in dismissing the complaint in the belief that it lacked jurisdiction. This cause is remanded to the District Court for further proceedings in accordance with this opinion.

*Reversed and remanded.*

United States Court of Appeals for the District of Columbia  
No. 9553. October Term, 1947

DOMESTIC AND FOREIGN COMMERCE CORPORATION, APPELLANT

*vs.*

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR &C.,  
APPELLEE

United States Court of Appeals for the District of Columbia.  
Filed Dec. 8, 1947. Joseph W. Stewart, Clerk.

Appeal from the District Court of the United States for the District of Columbia.

Before CLARK, WILBUR K. MILLER, and PRETTYMAN, J.J.

*Judgment*

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

Per Mr. JUSTICE CLARK.

Dated December 8, 1947.

United States Court of Appeals for the District of Columbia  
No. 9553

DOMESTIC AND FOREIGN COMMERCE CORPORATION, APPELLANT

*v.*

ROBERT M. LITTLEJOHN, AS WAR ASSETS ADMINISTRATOR AND  
SURPLUS PROPERTY ADMINISTRATOR, APPELLEE

United States Court of Appeals for the District of Columbia.  
Filed Feb. 3, 1948. Joseph W. Stewart, Clerk.



*Designation of record*

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for a writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix to appellant's brief, except pp. 51-53 thereof (*i.e.*, the portion beginning with the words "[End of District Court record" on p. 51 and continuing through the end of page 53).
2. Minute entry of argument.
3. Opinion of Court of Appeals.
4. Judgment of Court of Appeals.
5. This designation.
6. Clerk's certificate.

(Sgd.) Philip B. Perlman,  
 PHILIP B. PERLMAN,  
*Solicitor General.*

Service of copy of the above designation of record in the above-entitled case is hereby acknowledged this 2d day of February, 1948.

(Sgd.) STEPHEN J. McMAHON, Jr.,  
 A. S.  
*Attorney for Appellee.*

In the United States Court of Appeals for the District of Columbia

No. 9553

DOMESTIC AND FOREIGN COMMERCE CORPORATION, APPELLANT

*v.*

ROBERT H. LITTLEJOHN, AS WAR SURPLUS ADMINISTRATOR AND  
 SURPLUS PROPERTY ADMINISTRATOR, APPELLEE

United States Court of Appeals for the District of Columbia.  
 Filed Feb. 7, 1948. Joseph W. Stewart, Clerk.

*Counter designation of record in this court*

The Clerk will please include in the certified transcript of record for use in the Supreme Court of the United States in the above entitled cause, the following:

- (1) Appellant's motion (filed May 16, 1947) to advance hearing and to grant leave for mimeographed briefs and accompanying motion and affidavit attached thereto (except memorandum supporting motion).

(2) This designation.

(3) Clerk's certificate.

T. PETER ANSBERRY,

STEPHEN J. McMAHON, Jr.,

*Attorneys for Appellant.*

FEBRUARY 3, 1948.

We certify that one copy of this counter designation of record has this day been placed in an envelope and mailed to Oscar Davis, Department of Justice, attorney for appellee.

T. PETER ANSBERRY,

STEPHEN J. McMAHON, Jr.

United States Court of Appeals for the District of Columbia

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 64, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and of the record and proceedings in said Court of Appeals as designated by counsel for appellant and appellee in the case of: Domestic and Foreign Commerce Corporation, appellant, *vs.* Robert M. Littlejohn, as War Assets Administrator and Surplus Property Administrator, appellee, No. 9553, January Term, 1948, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this tenth day of February, A. D. 1948.

[SEAL]

(S) JOSEPH W. STEWART,

*Clerk of the United States Court of Appeals  
for the District of Columbia.*



## Supreme Court of the United States

*Order allowing certiorari*

(Filed April 19, 1948)

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.